No. 96-1101

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

WALTER T. SILMON,

Petitioner,

vs.

FIRST BANCORP OF LOUISIANA, INC., J. HERBERT BOYDSTUN, ROBERT P. MCLEOD, DELMA CARTER, R. L. DAVIS, JR., MALCOLM E. MADDOX and PATRICK L. SPENCER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FIRST BANCORP OF LOUISIANA, INC. AND HIBERNIA CORPORATION

BRENT B. BARRIERE, T.A.
Counsel of Record
HARRY ROSENBERG
TANIA TETLOW
PHELPS DUNBAR, L.L.P.
Attorneys for Respondents First Bancorp of Louisiana, Inc. and Hibernia Corporation
400 Poydras Street
Texaco Center, 30th Floor
New Orleans, Louisiana 70130
(504) 566-1311

QUESTION PRESENTED

Did the district court and court of appeals err in concluding (i) that the mere possibility of the sale of a bank at some unknown time to an unknown purchaser is not material unless and until there are negotiations of a possible sale and (ii) that a former officer and director failed to act with due diligence when he failed to make any inquiry or review any of the mass of readily available financial documents in connection with his investment decision.

STATEMENT PURSUANT TO RULE 29.6

Hibernia Corporation is the successor in interest to First Bancorp of Louisiana, Inc. Hibernia Corporation has no parent company and no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

From 1978 to 1990, petitioner Walter T. Silmon ("Silmon") was a principal shareholder, director and sometimes employee of First National Bank of West Monroe (the "Bank") and its successor, First Bancorp of Louisiana, Inc., ("First Bancorp"). In 1990, Silmon sold his substantial holdings of First Bancorp stock to First Bancorp and its subsidiary in a complex transaction which involved both substantial cost and time. A little more than two years later, in August, 1992, Silmon was required to decide whether to accept cash for his First Bancorp debentures or convert them to common stock. He elected to receive cash, but came to regret his decision when in the summer of 1994, First Bancorp was purchased by Hibernia National Bank ("Hibernia").

Silmon is a prominent and successful West Monroe, Louisiana businessman. In approximately 1978, Silmon began purchasing blocks of Bank stock, and in 1981 he was invited to join the Bank Board. After the 1985 death of the Bank's controlling shareholder, Silmon teamed with respondent, J. Herbert Boydstun ("Boydstun"), an officer of the Bank, and another banker to form a holding company which would purchase the stock of the former controlling shareholder and stock owned by non-Louisiana residents. As a result of the transaction, Silmon became the Bank's single largest individual shareholder.

In May, 1987, Boydstun and Silmon received a commitment from AmSouth Bank, N.A. ("AmSouth") to finance the stock purchase, conditioned upon the provision of $1,000,000 of subordinated debt or equity. It was agreed that this condition would be satisfied by the issuance of convertible subordinated debentures. Silmon desired that he alone would acquire the debentures. Accordingly, when First Bancorp was formed in

August, 1987, Silmon was issued ten convertible subordinated debentures. Silmon was granted the right to convert the debentures to First Bancorp stock; conversion was entirely unilateral and could be exercised at any time. Conversely, First Bancorp was granted the right to redeem the debentures at any time upon thirty days notice. Silmon was free to convert during the notice period.

Silmon was a member of the First Bancorp and Bank Boards and regularly attended monthly meetings of both. He was also an active member of various committees, including the loan committee. At First Bancorp meetings, Silmon received extensive and detailed materials relating to the performance of the Bank, including monthly, quarterly and annual internal financial statements, annual financial statements audited by KPMG Peat Marwick both for the Bank and First Bancorp, statements of expenses, statements of problem loans, projections of future performance and projections of future cash flow. Further, detailed analyses and other materials from various sources available to the general public, including *Sheshunoff, Ferguson's* and federal regulators, were routinely distributed to Board members.

On October 3, 1987, barely one month after the formation of First Bancorp, Boydstun and other Bank officers learned from press reports that Silmon had pleaded guilty to a federal felony offense. Silmon had not previously disclosed his criminal investigation to First Bancorp nor the Office of the Comptroller of the Currency.

Following his guilty plea, Silmon became increasingly disenchanted with his investment in First Bancorp. The guilty plea also resulted in the termination of Silmon's employment with the Bank. And in 1990, Silmon resigned from the First Bancorp and Bank Boards.

After his resignation, Silmon continued to receive financial information concerning First Bancorp and the Bank. For example, Silmon received the Bank's annual report for 1991. As required by federal regulation, the Bank published quarterly financial statements in the *Ouachita Citizen*, a newspaper of general circulation in West Monroe. While these materials were readily available to Silmon, he has acknowledged that he had no interest in them.

In February, 1992, Boydstun advised the Federal Reserve Bank and Whitney National Bank, the successor lender to AmSouth, that Silmon's debentures would be retired and that new debentures would be issued to officers of the Bank and First Bancorp. Neither objected.

A notice of redemption was delivered to Silmon by hand and by certified mail on July 30, 1992. The notice confirmed Silmon's option to take First Bancorp stock in lieu of cash. Silmon was specifically invited to contact Boydstun should he have any questions or inquiries concerning the redemption, First Bancorp or the Bank. Silmon did not contact Boydstun or anyone else associated with the Bank. Though Silmon was aware of the mountain of available financial information from his years as a First Bancorp and Bank director, he did not request any information or documents.

Silmon did consult with persons he considered to be experts. Specifically, Silmon spoke with his long-time CPA who advised him to convert the debentures to stock. Silmon also spoke with a prominent Monroe banker and attorney who noted that there was no market for the sale of community banks like First Bancorp and that the investment would be highly illiquid.

Silmon let the conversion date pass without giving notice to First Bancorp. On the date for redemption, Silmon appeared

at the Bank's office and collected his funds. First Bancorp partially financed the redemption by issuing new debentures on that same day. These new debentures differed from Silmon's in that they involved different face amounts and included additional restrictions on transferability, and the conversion price was slightly increased.

Silmon had no contact with First Bancorp until December, 1993. He read reports of a proposed merger involving First Bancorp and Premier National Bank, and his counsel wrote to First Bancorp suggesting that its officers knew of the proposed merger in the summer of 1992. In fact, the first contact concerning a sale occurred in May, 1993, when Boydstun was initially approached by Premier officers. After press reports concerning a possible transaction between First Bancorp and Premier appeared in October, 1993, Hibernia contacted First Bancorp. A merger with Hibernia was announced in November, 1993 and was consummated in August, 1994. Although Silmon had made a unilateral decision in the summer of 1992 to accept cash for his debentures, in January, 1994, he demanded that transaction be reversed and he be granted First Bancorp stock which he could tender to Hibernia. That demand was rejected, and this litigation followed.

REASONS FOR DENYING THE WRIT

After affording Silmon an admittedly unorthodox summary judgment hearing to provide him with every opportunity to create a fact issue for trial, the trial court concluded that Silmon had demonstrated neither that he was the victim of any material misrepresentations or omissions causing injury nor that he had acted with diligence with respect to his August, 1992 investment decision. On appeal, Silmon has done nothing to suggest that these conclusions were erroneous.

I.

PETITIONER'S FAILURE TO ESTABLISH THE EXISTENCE OF A MATERIAL MISREPRESENTATION OR OMISSION CAUSING HIM INJURY.

The Petitioner disputes the district court's holding that the bank's alleged omission of its improved financial situation and its intention to reissue debentures do not constitute actionable material omissions. Silmon misrepresents the grant of summary judgment as based on the immateriality of the alleged omissions. The district court instead questioned the connection of those allegations to the source of Silmon's purported injury — the alleged "secret merger plan." Regardless of the abstract materiality of the alleged omissions, Silmon did not state a claim establishing the causal link between the alleged omissions and his alleged lost profits.

In order to establish a securities fraud claim under Section 10(b) and Rule 10b-5,[1] a plaintiff must allege and prove "(1) a misstatement or an omission (2) of a material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused the plaintiff's injury." *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993) (citation omitted). The plaintiff must show both "transaction causation" — that, but for the misrepresentation or omission, the plaintiff would not have acted to his detriment — and "loss causation" — that the violation proximately caused the plaintiff's injury. *Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742 (2nd Cir. 1992). The district court granted summary judgment based on Silmon's failure to establish either transactions causation or loss causation.

Silmon regrets his choice to redeem the debentures for cash rather than stock because First Bancorp's later merger increased the value of its stock. This alleged injury, however, remains

1. 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5

entirely unconnected to the alleged material omissions at the time of the retirement of Silmon's debentures, years earlier. There exists no evidence to indicate that Silmon's redemption of the debentures for cash rather than stock had any influence on First Bancorp's decision to merge, therefore the question of the materiality of the omissions is moot.[2] Indeed, there can be no serious suggestion of a material omission. As noted by the district court, there is simply no evidence that First Bancorp intended to merge at the time it redeemed Silmon's debentures.

II.

PETITIONER'S LACK OF DUE DILIGENCE.

An additional basis for the granting of summary judgment was the petitioner's failure to exercise due diligence. The Fifth Circuit has stated that due diligence is a separate element of a plaintiff's 10b-5 action. *Trust Co. of Louisiana v. N.N.P., Inc.*, 104 F.3d 1478, 1490 (5th Cir. 1997).

The underlying court properly identified and relied on the standard of due diligence established by the Fifth Circuit. That standard being, "[a] Rule 10b-5 plaintiff may not intentionally refuse to investigate 'in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.' " *Haralson v. E.F. Hutton*, 919 F.2d 1014, 1031 (5th Cir. 1990) *citing Dupuy v. Dupuy*, 551 F.2d 1005, 1020 (5th Cir. 1977), *cert. denied*, 434 U.S. 911.

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2. The district court also found that First Bancorp did not omit to inform Silmon of its improvement in earnings. The evidence at summary judgment established that the bank sent its annual report to Silmon personally, and published its earnings in the local newspaper. Silmon cannot convert his failure to read the bank's financial statements into a material omission.

The underlying court considered all of the evidence regarding petitioner's 10b-5 claim and concluded:

> With this background, a reasonable juror could not conclude that Silmon acted with due diligence. If he had requested information from Bancorp and they failed to provide him with accurate information or misstated material facts, then Silmon might have a claim. But, this was not the case. Bancorp merely acted within its contractual rights to redeem the debentures. Silmon requested *no* information and made *no* inquiries as he was invited to do by the redemption letter (emphasis by the court). After almost ten years as a bank director, he knew the questions to ask and the persons who had the information.

When considering the due diligence of a 10b-5 plaintiff, it is not the court's function to throw "life rings" to plaintiff who are victims of their own poor business judgment. *Schlesinger v. Hertzog*, 2 F.2d 135, 141 (5th Cir. 1993). Petitioner's failure to take any action to investigate the appropriateness of the debenture conversion cannot be categorized as anything but lack of due diligence.

III.

THERE WAS NO PATTERN OF FRAUD PRACTICED AGAINST THE PETITIONER.

In the underlying action, petitioner presented a scattershot of allegations in an unsuccessful effort to establish a RICO claim against the respondents. Under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff was repeatedly

granted leave to state a claim under RICO and just as repeatedly failed to do so. Here, the petitioner has narrowed his focus to an allegation of securities fraud which occurred when the respondents caused First Bancorp to purchase ESOP stock owned by former bank employees in 1992 and 1993.[3] Notably, Silmon was never a vested participant in the First Bancorp ESOP, and he had absolutely no connection to the employees' stock tender.

When considering a Rule 12(b)(6) motion on a RICO claim, the facts alleged in the complaint must be read in a light most favorable to the petitioner. *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989). However, the Fifth Circuit and other circuits have stated that when making a RICO claim based on fraud, the plaintiff's pleadings must be made with the specificity required by Rule 9(b). *Old Time Enters. v. International Coffee, Inc.*, 862 F.2d 1213, 1217 (5th Cir. 1989); *Vild v. Visconti*, 956 F.2d 560 (6th Cir. 1992), *cert denied*, 506 U.S. 832; *Grave Mill Development Corp. v. Colonial Bank & Trust Co.*, 929 F.2d 988 (7th Cir. 1991); *Craighead v. E. F. Hutton*, 899 F.2d 485 (6th Cir. 1990); *Blake v. Dierdorft*, 856 F.2d 1365 (9th Cir. 1988); *New England Data Services, Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987).

The district court found that the allegations in the petitioner's complaint failed to provide sufficient detail regarding the time, place and contents of the alleged misrepresentations and omissions. In its Report and Recommendations, the underlying court specifically referred to the lack of factual specificity regarding the 1992 and 1993 ESOP purchases:

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3. Petitioner claims that the underlying court misinterpreted the requirements of 18 U.S.C. § 1344 when considering the repurchase of the ESOP stock by First Bancorp. However, the stock repurchase was an alleged act of securities fraud not bank fraud which is the subject of 18 U.S.C. § 1344. Thus, petitioner's argument regarding the underlying court's alleged misinterpretation is inconsequential.

> . . . there are vague allegations that the defendants should have known that the value of the stock was worth more than its purchase price, or that it would shortly increase in value. There are also allegations that the value of the stock was "suppressed" in an appraisal for the defendants . . . Plaintiff does not allege, however, any facts in support of his conclusions that the value of the stock actually was higher than the purchase price at the time of these transactions and that the value stated in the appraisal was inaccurate; nor does he allege any facts in support of his conclusion that the defendants had knowledge that the actual value of the stock was higher than the amount paid.

This excerpt from the Report and Recommendation shows that the court did view the allegations made by the petitioner in a light most favorable to him. Nevertheless, the petitioner failed to make the requisite factual demonstration required by Rule 9(b) when bringing a federal securities fraud claim. Thus, the granting of respondents' Rule 12(b)(6) motion on petitioner's RICO claim was proper.

At a minimum, Rule 9(b) requires allegations of the particulars of time, place and contents of the false representations, the identify of the person making the misrepresentation and what was obtained by the misrepresentation. *Shushary v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993) *citing Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134 (5th Cir. 1992). Silmon was unable to provide this detail despite being granted repeated opportunities to do so.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari does not present an issue which warrants review by this Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

BRENT B. BARRIERE, T.A.
Counsel of Record
HARRY ROSENBERG
TANIA TETLOW
PHELPS DUNBAR, L.L.P.
Attorneys for Respondents
First Bancorp of Louisiana, Inc.
and Hibernia Corporation
400 Poydras Street
Texaco Center, 30th Floor
New Orleans, Louisiana 70130
(504) 566-1311